IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOYCE SICALIDES,	:	CIVIL ACTION
Plaintiff,	:	
v.	:	NO. 99-CV-3465
PATHMARK STORES, INC., et al.,	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, J. JUNE 12, 2000

Before this Court is the Motion for Summary Judgment filed by Defendant Pathmark Stores, Inc.,[1] ("Pathmark"). Plaintiff Joyce Sicalides ("Ms. Sicalides") brought this action against Pathmark, her former employer, alleging sexual harassment by another Pathmark employee in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sections 2000-e, et seq., ("Title VII") and the Pennsylvania Human Relations Act, 43 P.S. section 951 et seq., ("PHRA"), and a state law claim for intentional infliction of emotional distress. For the reasons that follow, the Motion is granted.

I. BACKGROUND

The facts relevant to this discussion are as follows.

[1] Pathmark Stores, Inc., doing business as Pathmark, was formerly known as New Pathmark Central Corporation.

Ms. Sicalides began working as a part-time deli clerk in Pathmark's Fairless Hills, Pennsylvania store in August, 1996. While she worked at Pathmark, she was also employed full-time at New Jersey Manufacturer Insurance Company ("NJM"), where she is still employed. Ms. Sicalides claims that she was sexually harassed while she worked at Pathmark by another Pathmark employee, Taylor Klein ("Mr. Klein") in May of 1997. She also claims that Mr. Klein retaliated against her after she complained to her assistant store manager, Mike Ryan ("Mr. Ryan") about his behavior. Ms. Sicalides continued to work for Pathmark until March 17, 1998, when she took a brief leave of absence allegedly due to the stress she was suffering as a result of Mr. Klein's behavior.[2] Thereafter, she voluntarily resigned from Pathmark on May 22, 1998.

Ms. Sicalides' claim of sexual harassment is based upon five separate incidents, all involving the behavior of Mr. Klein. Mr. Klein worked part-time in the deli department of Pathmark's Fairless Hills, Pennsylvania location from approximately April, 1997 to May, 1997. From approximately June, 1997 until February, 1998, Mr. Klein worked in the seafood or dairy department, until he returned to the deli department as a full-time "lead deli

[2] Although Ms. Sicalides claims she needed to take this leave due to stress, she did not miss any time from her full-time job at NJM. Further, after her resignation from Pathmark, Ms. Sicalides found other part-time work. As such, she is not claiming damages for lost past or future wages.

clerk" in March, 1998. Roger Kolb was the manager of the deli department. (Pl.'s Br. at 3.)

Pathmark maintains a sexual harassment policy which is contained in the company's employee handbook and is posted in the break room at the Fairless Hills location. (Klein Dep. at 147; Ryan Dep. at 20; Klucaric Dep. at 26; Kolb Dep. at 72,74). Ms. Sicalides received a copy of the employee handbook and read it. (Sicalides Dep. at 35-36). The posted policy provides a name and address to contact at corporate headquarters and the division human resource manager's name and telephone number. (McGinley Dep. at 109).

The first incident of sexual harassment Ms. Sicalides complains of allegedly occurred in May of 1997. She claims that while she was standing in front of the sinks in the deli department, Mr. Klein "brushed by and rubbed up against [her] buttocks" with what she assumes was the front part of his body. (Sicalides Dep. at 49). She claims that on this occasion, Mr. Klein only brushed her once. Id. at 50. Ms. Sicalides admits that the area in which this incident allegedly occurred was approximately only three and a half feet wide, and that she herself had to "squeeze by" in that area if another worker happened to be there. Id. at 53. She further admitted that if one were not careful, one could brush up against another worker walking through that area. Id. She also testified that other

people had previously brushed up against her in a similar manner in the past, and that she herself had done so in the past. Id. at 54-55. Ms. Sicalides did not report this incident to anyone because she thought it was accidental. Id. at 54.

The next incident Ms. Sicalides describes occurred approximately a week later, when Ms. Sicalides was again standing in the sink area. Id. at 55-56. She claims Mr. Klein walked by her and brushed against her in the same manner as he had done the previous week. Id. at 56. Ms. Sicalides claims she may have said "excuse me" to Mr. Klein, but she did not report the incident to anyone. Id. at 57.

The third incident occurred when Ms. Sicalides was removing blocks of cheese from the walk-in deli cooler. Id. at 59. She claims she was handing blocks of cheese to Mr. Klein, and that he simultaneously reached for a block of cheese and "grabbed" her breast in the process. Id. She claims she asked him what he was doing, and he responded that he had been taking the cheese. Id. at 63.

After the "cheese episode," Ms. Sicalides spoke to Michelle Young, another Pathmark employee, about these incidents. Ms. Young allegedly told Ms. Sicalides that Mr. Klein wanted to "get with her." Id. at 74. Ms. Sicalides interpreted this to mean that Mr. Klein "liked [her] or wanted to be with [her]." Id. at 74-75. Ms. Sicalides claims to have told Ms. Young that

she was not interested in Mr. Klein. Id. at 75. Ms. Sicalides claims Ms. Young otherwise disregarded her complaints. Id.

The fourth incident allegedly occurred a few days later, again in the sink area. Id. She claims she was bending over, washing dishes, and that Mr. Klein walked by behind her and brushed her with his hand. Id. at 68. Ms. Sicalides claims she told Mr. Klein to "knock it off," but that Mr. Klein just kept walking as though nothing had happened. Id. at 69-70.

The fifth incident, which Ms. Sicalides claims occurred a couple of days later, consisted of the same brushing up against her while she was standing at the sinks. Id. at 78. She claims she again told Mr. Klein to "knock it off." Id. at 80. At that time she had still not spoken to Mr. Ryan or Mr. Kolb about any of the incidents. Id. at 78. She claims that the day after this incident she spoke again with Michelle Young, again informing her about the "brush bys" and the cheese episode. Id. at 83. She claims that Ms. Young told her to speak with Mr. Ryan. Id. Ms. Sicalides approached Mr. Ryan that same evening, and told him that she "was having problems with [Mr. Klein]." Id. at 86-89. She also told him that Mr. Klein was "exhibiting behavior that [she] found to be inappropriate" and that she "didn't feel comfortable." Id. at 89. She claims that Mr. Ryan told her that he would "look into it," speak with Mr. Kolb and "pull [Mr. Klein] into the office." Id. at 90. Mr. Ryan claims he did

speak with Mr. Klein. (Ryan Dep. at 27). Mr. Ryan allegedly had one follow-up conversation with Ms. Sicalides approximately a week later, in which Mr. Ryan approached Ms. Sicalides and asked her how things were going. (Sicalides Dep. at 92). She claims she responded that Mr. Klein had "a really nasty attitude" and was bitter toward her, but that Mr. Ryan just shrugged this information off. Id.

At this point, Ms. Sicalides admits there were no other instances of sexual harassment. Id. at 95. However, she claims that in August, 1997, Mr. Klein "verbally harassed" her. Id. Specifically, she claims that Mr. Klein made conversation with Ms. Sicalides about his girlfriend, who was out of town for a week. Id. at 96, 98. He allegedly told Ms. Sicalides that his "big empty apartment would come in handy." Id. at 98. He then allegedly nudged her side. Id. at 97. Ms. Sicalides did not think the nudge was sexual. Id. However, she claims that she seriously thought Mr. Klein was making a pass at her. Id. at 101. She did not report this incident to management, allegedly because management had never effectively handled her prior complaints. Id.

In June or July of 1997, after Ms. Sicalides spoke with Mr. Ryan, Ms. Sicalides claims that Mr. Klein again verbally harassed her after she handed him some corned beef for a customer whom he had just informed that the store was out of corned beef.

Id. at 102. Ms. Sicalides claims that Mr. Klein said, "don't you ever do that to me again," in front of another employee. Id. at 103. She further claims that anytime she was near Mr. Klein he was "short and nasty" to her in front of other employees and would "bark off orders every single occasion" and curse at her. Id. at 104, 107.

From mid-1997 until February or March of 1998, Mr. Klein worked in the dairy or seafood department. (Pl.'s Br. at 8; Sicalides Dep. at 250). Ms. Sicalides had little contact with him during that period, and does not complain of any incidents during that time. Ms. Sicalides claims that on March 11, 1998, the first date that she and Mr. Klein worked together since his return to the deli department full-time, Mr. Klein, during an argument in which Ms. Sicalides admits she raised her voice, told her that she had a "bad attitude" and complained that she wasn't properly attired in her uniform. (Sicalides Dep. at 135, 136-139). He also told her that if she didn't like him, she should transfer to another department. Id. at 136.

Ms. Sicalides did not return to Pathmark after March 17, 1998. Id. at 149. She did, however, continue to go to work at her full-time job at NJM. Id. at 148. She consulted her family physician for stress and anxiety on March 19, 1998 through approximately May 18, 1998, who removed her from working from Pathmark. Id. at 147. In May of 1998,Pathmark informed Ms.

Sicalides that she had to keep in regular contact with Pathmark on a biweekly basis, in addition to providing a doctor's note. Id. at 177.

Thereafter, Ms. Sicalides filed an administrative charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 8, 1998. (Pl.'s Br. at 9). Ms. Sicalides was aware that after she filed the charge, Pathmark's Human Resources Department was attempting to investigate her sexual harassment allegations, but she refused to meet with them in person or by telephone. (Sicalides Dep. at 186-189).

Ms. Sicalides formally resigned from Pathmark on May 22, 1998. Id. at 195. She obtained other part-time jobs to replace her income at Pathmark beginning in May of 1998. She filed this lawsuit on July 8, 1999.

II. STANDARD OF REVIEW

"Summary judgment is appropriate when, after considering the evidence in the light most favorable to the nonmoving party, no genuine issue of material fact remains in dispute and `the moving party is entitled to judgment as a matter of law.'" Hines v. Consolidated Rail Corp., 926 F.2d 262, 267 (3d Cir. 1991) (citations omitted). "The inquiry is whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one sided that one party must, as a matter of law, prevail over the other." Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party carries the initial burden of demonstrating the absence of any genuine issues of material fact.[3] Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1362 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Once the moving party has produced evidence in support of summary judgment, the nonmovant must go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. DISCUSSION

A. Title VII claims.

1. Timeliness.

Title VII allows a plaintiff to bring suit within 180 days of the alleged act of discrimination. Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994) (citing 42 U.S.C. § 2000e-5(e)). However, if the plaintiff files

[3] "A fact is material if it could affect the outcome of the suit after applying the substantive law. Further, a dispute over a material fact must be 'genuine,' i.e., the evidence must be such 'that a reasonable jury could return a verdict in favor of the non-moving party.'" Compton v. Nat'l League of Professional Baseball Clubs, 995 F. Supp. 554, 561 n.14 (E.D.Pa.) (citations omitted), aff'd, 172 F.3d 40 (3d Cir. 1998).

a complaint with a state or local agency authorized to adjudicate the claim, the plaintiff is allotted 300 days from the date of the alleged discrimination to file a charge of employment discrimination. Id. In the instant case, Ms. Sicalides filed her EEOC charge on April 8, 1998. Therefore, any claim based upon discrimination which occurred before June 12, 1997 would ordinarily be time-barred. The only incidents in Ms. Sicalides' Complaint which are timely are Mr. Klein's comment about his empty apartment accompanied by the nudge, and the March 11, 1998 "verbal harassment" episode.

a. Continuing Violation.

Under the continuing violation theory, a Title VII Plaintiff may pursue her claim for discriminatory conduct that occurred outside the filing period if she can demonstrate that the act is a part of an ongoing practice or pattern of discrimination of the defendant. West v. PECO, 45 F.3d 744, 754 (3d Cir. 1995). Courts have also applied the continuing violation theory in the PHRA context. Cortes v. R.I. Enters., No.Civ.A. 3:99-CV-1339, 2000 WL 575918, at *7 (M.D.Pa. Apr. 18, 2000). In order to establish a claim that falls within the continuing violations theory, the United States Court of Appeals for the Third Circuit ("Third Circuit") requires a plaintiff to prove that: (1) at least one act of discrimination occurred within the filing period, and (2) the harassment is "more than

the occurrence of isolated or sporadic acts of intentional discrimination." West, 45 F.3d at 754 (quoting Jewett v. International Tel. and Tel. Corp., 653 F.2d 89, 91 (3d Cir.), cert. denied, 454 U.S. 969 (1981)). "The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern." West, 45 F.3d at 755. A plaintiff satisfying these requirements may recover for the entire continuing violation; the 300-day filing period will not act as a bar. Id.; Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997).

Ms. Sicalides' argument in support of the application of a continuing violation theory consists in its entirety of the following paragraph:

> The evidence adduced during discovery and cited in Section III supra depicts a man who lasciviously pursued Plaintiff in May and August of 1997 and then, when rebuffed and rebuked after each episode, sought revenge by making her working environment intolerable whenever possible. For Defendants to argue that "[t]he incidents in May, 1997 are separate, isolated incidents which do not rise to the level of an ongoing practice of harassment by Klein" is delusional. The brushing and cheese/breast-grabbing incidents of May 1997 followed by Klein's verbal abuse after she complained are, incontrovertibly, inextricable threads in Klein's enduring pattern of sexual harassment against Plaintiff.

(Pl.'s Br. at 10).

At the outset, Ms. Sicalides' generalized argument supporting a continuing violation theory is insufficient to survive a motion for summary judgment. "When opposing a summary

judgment motion, the non-moving party 'cannot rely on unsupported assertions, conclusory allegations, or mere suspicions.'" American Int'l Surplus Ins. Co., v. IES Lead Paint Div., Inc., et al., No. 94-4627, 1996 WL 135334, at *6 (E.D.Pa. Mar. 18, 1996)(quoting Chemical Bank v. Dippolito, 897 F. Supp. 221, 223 (E.D.Pa. 1995)). Moreover, "[u]nsubstantiated and subjective beliefs and opinions are not competent summary judgment evidence." Forsyth v. Barr, 19 F.3d 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994). Therefore, summary judgment in favor of Pathmark is warranted based solely upon Ms. Sicalides' failure to support her position.

Nonetheless, we will address the merits of this issue. With regard to the first requirement under West, that at least one act of discrimination occurred within the filing period, the only incident of sexual harassment that Ms. Sicalides claims occurred within the time period was the August 1997 comment about Mr. Klein's apartment. With regard to the second requirement, that the acts complained of constitute more than the occurrence of isolated or sporadic acts of intentional discrimination, in West, the Third Circuit established the following factors to be considered in determining whether an ongoing pattern of discrimination exists: (1) subject matter, or whether the violations constitute the same type of discrimination; (2) frequency; and (3) permanence, or whether the nature of the

violations should trigger the employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate. West, 45 F.3d at 755 n.9 (citing Martin v. Nannie and Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993)).

With respect to the subject matter requirement, the August 1997 incident was not sufficiently similar in nature to the May 1997 incidents to link the incidents under a continuing violation theory. While all of the alleged May incidents involved sexual touching (although Ms. Sicalides believed that two of those incidents were accidental), the August 1997 incident involved an ambiguous comment accompanied by a non-sexual nudge. Even assuming that the August 1997 incident constitutes an act of sexual harassment, it is at most a nebulous verbal proposition, and as such, is of a much different nature than the alleged brushing and breast-grabbing incidents of May, 1997.

With respect to the frequency requirement, it is undisputed that approximately three months passed without incident between the May brush-bys/grabbing and the August 1997 comment, during which time Ms. Sicalides worked with Mr. Klein. This hiatus prevents Ms. Sicalides from establishing the requisite frequency under West. Recently, in Fala v. Perrier, No. 99-CV-3319, 2000 WL 688175 (E.D.Pa. May 25, 2000)[4], this

[4] Page numbers are not available for this opinion.

Court addressed the question of whether a continuing violation theory may be applied where a significant period of time passed in between timely and untimely incidents of alleged harassment. In that case, approximately ten months passed between the last timely act of alleged discrimination and the first untimely act. During this hiatus, the plaintiff worked with her alleged harasser and stated that she felt comfortable with him and that she had a good working relationship with him. This Court found that the hiatus between the acts of discrimination destroyed the continuity the plaintiff sought to establish, and precluded the plaintiff from establishing frequency under West. See also Konstantopoulos v. Westvaco Corp., 112 F.3d 710 (3d Cir. 1998)(holding that seven-month hiatus in between acts of harassment allowed lingering effects of harassment to dissipate and precluded application of continuing violation theory); Bishop v. National R.R. Passenger Corp., 66 F.Supp.2d 650, 660 (E.D.Pa. 1999)("For various acts of sexual harassment to be joined together into a single claim . . . the acts must be reasonably close to each other, in time and circumstances, because [a]cts . . . so discrete . . . that they do not reinforce each other cannot reasonably be linked together into a single claim, a single course of conduct, to defeat the statute of limitations")(quoting Koelsch v. Beltone Elec. Corp., 46 F.3d 705, 707 (7th Cir. 1995)).

Moreover, the August 1997 comment and nudge, the only act of sexual harassment Ms. Sicalides alleges, can hardly be seen as severe. Under similar facts, in Konstantopoulos, the Third Circuit held that timely acts of harassment after nearly seven months, which consisted of mute gestures by male coworkers' squinting their eyes and shaking their fists, were not particularly severe, and therefore could not be linked to timely acts. Konstantopoulos, 112 F.3 at 715-716. Accordingly, in the instant case, the passage of time between alleged incidents combined with the relatively innocuous nature of the August 1997 incident precludes the application of a continuing violation theory and Ms. Sicalides' Title VII claims are time-barred.[5] Moreover, in addition to failing as time-barred, Ms. Sicalides' Title VII claims are substantively meritless as well. We will address the merits of these claims individually.

2. Hostile Work Environment

Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color religion, sex, or national origin." Kunin v. Sears Roebuck and Co., 175 F.3d 289,

[5] Further, the March, 1998 incident of verbal harassment is even less capable of supporting a continuing violation theory, as it occurred ten months after the last timely incident, and Ms. Sicalides admits it lacked any sexual dimension.

292-93 (3d Cir.), cert. denied, 120 S.Ct. 398 (1999)(quoting 42 U.S.C. § 2000e-2(a)(1)). It is well-known that a plaintiff can establish a violation of Title VII by proving that the sexual harassment created a hostile or abusive work environment. Williamson v. City of Houston, 148 F.3d 462, 464 (5th Cir. 1998)(citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

To establish a sexual harassment claim for hostile work environment under Title VII, a plaintiff must show the following five elements: (1) she suffered intentional discrimination because of her sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected her: (4) the discrimination would detrimentally affect a reasonable person of the same sex in the same position; and (5) the existence of respondeat superior liability. Kunin, 175 F.3d at 293 (citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). An employer will not be liable for a hostile work environment unless it "knew or should have known of the harassment and failed to take prompt remedial action."[6]

[6] A different standard is applied to determine employer liability under Title VII when the sexual harassment is by a supervisor rather than a coworker. Kunin v. Sears Roebuck and Co., 175 F.3d 289, 293 n.5 (3d Cir. 1999). When the harassment is by a supervisor, the employer is liable if the supervisor "took tangible employment action" against the employee. Kent v. Henderson, 77 F.Supp.2d 628, 632 (E.D.Pa. 1999). In the instant case, Ms. Sicalides attempts to raise an issue as to whether Mr. Klein held a supervisory role over Ms. Sicalides or whether he

was merely a coworker.

In support of her contention that Mr. Klein was her supervisor, Ms. Sicalides has provided the statements of two coworkers who collectively indicate that Mr. Klein was their "boss." (McCarthy Statement, 3/17/98; Melchiorre Statement, 3/13/98). Additionally, Mrs. Sicalides' relies on Mr. Klein's deposition testimony that when Mr. Kolb was not on duty, Mr. Klein supposed it was he who was "in charge." (Klein Dep. at 41-42). Mr. Klein described his understanding of being "in charge" as merely performing those tasks that Mr. Kolb instructed him to perform at night. Id. However, a "supervisor" within the meaning of Title VII is an individual who has the power to "hire and fire, and to set work schedules and pay rates." Faragher v. City of Boca Raton, 118 S.Ct. 2275, 2291 (1998)(citing Estrich, Sex at Work, 43 Stan. L.Rev. 813, 854 (1991)).

Ms. Sicalides cites to a recent jury instruction given by this Court in Gentner v. Cheyney Univ. of Pa., No.Civ.A. 99-7443, 1999 WL 820864 (E.D.Pa. Oct. 14, 1999). However, Ms. Sicalides has not provided any evidence that Mr. Klein had the ability to influence hiring and firing decisions, influence her work schedule, evaluate her, fire, hire, promote, or reassign her, which were precisely the issues this Court instructed the Gentner jury to consider. "The burden of proof to show that [the harasser] was plaintiff's supervisor lies with plaintiff." Kent, 77 F.Supp.2d at 633 (citing Andrews c. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990)). Nor has she rebutted Pathmark's evidence that Mr. Klein had no authority to hire, fire, discipline or evaluate employees, grant overtime, determine wage rates, or transfer employees to other departments. (McGinley Dep. at 117).

Ms. Sicalides also relies upon Durham Life Ins. Co. v. Evans, 166 F.3d 139, 150 (3d Cir. 1990) for the proposition that "the authority to act alone on the employer's behalf, with no other controls, is not required for an employee to possess supervisory authority." (Pl.'s Br. at 11 n. 7). Durham is inapposite. In that case, the court held that one member of a three-person team could be found to be a supervisor where agreement with the other group members was required before members could act on the employer's behalf. Durham, 166 F.3d at 154-55.

Accordingly, we find as a matter of law that Mr. Klein was merely Ms. Sicalides' coworker, and Pathmark can only be held liable under the doctrine of respondeat superior. See Kunin, 175 F.3d at 293 (holding that where alleged sexual harassment is by coworker, case is to be decided on basis of notice to the employer in order to establish respondeat superior).

Kunin, 175 F.3d at 293; Kent v. Henderson, 77 F.Supp.2d 628, 632 (E.D.Pa. 1999).

The facts in this case are strikingly similar to those in Kunin. In that case, the plaintiff attempted to sue her employer, Sears, claiming that the repeated cursing directed at her over a three-week period by a coworker created a hostile work environment. Id. at 290. The only notice of this behavior to Sears occurred when the plaintiff approached her supervisor, in the presence of the coworker, and asked whether "cursing was allowed on the sales floor." Id. The supervisor responded that it was not. Id. at 291. The plaintiff did not inform her supervisor until the end of the three-week period that her coworker had been using vulgar language that offended her. Id. at 290.

After a jury trial, a verdict was entered in favor of the plaintiff. Id. Sears appealed, alleging, inter alia, that the plaintiff had failed to establish respondeat superior liability. Id. at 293. The Third Circuit agreed, holding that although the plaintiff had provided her supervisor with notice of harassment, because the plaintiff "did not complain specifically that [her coworker] was harassing her, her interaction with [her supervisor] did not constitute actual notice to Sears." Id. at 294. The court therefore went on to consider whether the

plaintiff had provided Sears with constructive notice of the harassment. Id.

The Third Circuit described two kinds of constructive notice. Id. The first kind occurs where an employee provides management level personnel "with enough information to raise a probability of sexual harassment in the mind of a reasonable employer." Id. The second kind of constructive notice occurs where the harassment "is so pervasive and open that a reasonable employer would have to be aware of it." Id.

Guided by these principles, the court held that while the plaintiff's query to her supervisor about cursing arguably suggested that she was having difficulty with another worker, her use of the word "cursing" did not communicate that the language she was objecting to had sexual overtones. Id. The court noted that "[c]ourts have found that when employees' complaints do not refer to sexually offensive behavior, employers are not on constructive notice of sexual harassment. Id. (citing Murray v. New York Univ. College of Dentistry, 57 F. 3d 243, 250 (2d Cir. 1985)(holding that dental student's complaint to supervising doctor that a patient was staring at her and trying to get her attention was insufficient to put employer on notice that student was being sexually harassed in violation of Title IX); Schiraldi v. AMPCO Sys. Parking, 9 F.Supp.2d 213, 216, 220 (W.D.N.Y. 1998)(holding that employee's complaints that coworker would not

leave her alone and called her names did not constitute constructive notice to employer since there was no indication that the complained of actions were sexual)).

In the instant case, Ms. Sicalides admits that the only member of Pathmark management that she complained to about sexual harassment was Mr. Ryan.[7] (Sicalides Dep at 66). However, because Ms. Sicalides did not specifically complain to Mr. Ryan that Mr. Klein had allegedly been sexually harassing her, her conversation with Mr. Ryan did not constitute actual notice to Pathmark. See Kunin, 175 F.3d at 294-95.

Moreover, Ms. Sicalides' complaint was insufficient to put Pathmark on constructive notice. She merely informed Mr. Ryan that she was having a problem with Mr. Klein, felt he had been inappropriate and felt uncomfortable. She provided no details and never mentioned sexual harassment. Because her complaint did not communicate that Mr. Klein's behavior had sexual overtones, it was insufficient under Kunin to raise the probability that she was being sexually harassed.

Moreover, Ms. Sicalides has set forth no evidence that the harassment she alleges was so open and pervasive that a reasonable employer could not have been ignorant of it. Rather, while she has submitted affidavits of other coworkers who have

[7] Ms. Sicalides has not argued that her conversations with Ms. Young constitute any kind of notice of her claims to Pathmark.

attested to witnessing Mr. Klein being rude to Ms. Sicalides, accusing her of having a bad attitude, yelling at her and giving her commands and picking on her (McCarthy Statement, 3/16/98; Kinnebrew Statement, 3/13/98; Melchiorre Statement, 3/13/98), all of the incidents which could be characterized as sexual harassment occurred when she and Mr. Klein were alone together, e.g., at the sinks or in the refrigerator.[8] Therefore, Pathmark cannot reasonably be expected to have had this type of constructive notice. See Kunin, 175 F.3d at 294 (holding that Sears could not reasonably be held liable for employee's vulgar comment to plaintiff where comments were made out of management hearing, occurred over a brief period of time and were limited in number). As such, Ms. Sicalides has failed to establish constructive notice sufficient to establish respondeat superior liability on Pathmark's part.

Moreover, even if her complaint to Mr. Ryan did constitute notice to Pathmark of the sexual harassment, Ms. Sicalides' claims still fail since Pathmark took prompt remedial action once it learned of Ms. Sicalides complaints. Pathmark's first notice of her claims occurred when she filed her EEOC charge on April 8, 1998. Subsequently, Ms. Sicalides admits that Pathmark conducted an investigation of her claims. Specifically,

[8] Moreover, the Melchiorre statement describes Mr. Klein as yelling at several coworkers, rather than just Ms. Sicalides.

Rick McGinley, Director of Human Resources for Pathmark, visited the Fairless Hills store, interviewed store manager Steve Klucaric, Mr. Kolb, Mr. Klein, Ms. McCarthy, and Emmith Kennebrew and obtained statements from these witnesses. (McGinley Dep. at 28-29). Pathmark's Human Resources department attempted to meet with Ms. Sicalides to discuss her claims, but she refused to meet with them by telephone or in person. Mr. McGinley's investigation revealed no evidence to support Ms. Sicalides' claim. (Sicalides Dep. at 148-149). Moreover, Pathmark was unable to further investigate Ms. Sicalides' claims due to her refusal to cooperate with Human Resources and to provide information. As such, we are satisfied that Pathmark attempted to take prompt remedial action with regard to Ms. Sicalides claims, and refuse to hold them at fault for Ms. Sicalides' own obstruction of their efforts. Accordingly, summary judgment is granted in favor of Pathmark on Ms. Sicalides' hostile work environment claim.

B. Retaliation.

Ms. Sicalides' claim for retaliation under Title VII fails for the same reasons. See Knox v. State of Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (holding that theory that employer may be held liable under Title VII only if it had notice or knowledge of the problem extends to claims of unlawful retaliation). Moreover, Ms. Sicalides' claim that the March 11,

1998 “verbal harassment” constitutes retaliation is otherwise meritless. In order to establish retaliation under Title VII, a plaintiff must prove that (1) she engaged in a protected activity; (2) she suffered an adverse employment action either after or contemporaneous with their protected activity; and (3) a causal connection existed between the protected activity and the employer’s adverse action. Krouse v. American Sterilizer Co., 126 F.3d 494, 500 (3d Cir. 1997).

Here, Ms. Sicalides did not suffer an adverse employment action. An adverse employment action is one which “constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant changes in benefits.” Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). As explained above, Mr. Klein did not have the authority over Ms. Sicalides to take such action. Moreover, “[m]inor or trivial actions that merely make an employee ‘unhappy’ are not sufficient to qualify as retaliation under [Title VII]....” Robinson v. City of Pittsburgh, 120 F.3d 1289, 1300 (3d Cir. 1997). Furthermore, “unsubstantiated oral reprimands” and “unnecessary derogatory comments” following the filing of an EEOC complaint do not rise to the level of “adverse employment action” required for a retaliation claim. Id. at 1301. We find that the verbal dispute regarding Ms. Sicalides’

attitude and her uniform in which she herself raised her voice is the sort of minor incident that the Third Circuit held is insufficient to constitute an adverse employment action.

Finally, the seven-month gap between the last incident complained of and the verbal harassment in March refutes the existence of the requisite causal link. See Hughes v. Derwinski, 967 F.2d 1168, 1174 (7th Cir. 1992) (holding that four months between protected activity and retaliation was too long to establish causation); Norris v. Lee, No.Civ.A. 93-0441, 1995 WL 428669 (E.D.Pa. Jul.14, 1995)(holding four months between protected activity and discharge precludes finding of causal link). Although Ms. Sicalides points out that she had little contact with Mr. Klein during the seven-month period, they worked in the same store and Mr. Klein certainly could have retaliated against her earlier had he chosen to.[9]

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[9] The Complaint also alleges a claim for retaliation based upon the substance of two phone calls from Pathmark, allegedly in retaliation for Ms. Sicalides' filing her EEOC charge, in May of 1998. The first phone call consisted on an inquiry regarding when Ms. Sicalides was planning on returning to work. The second was to advise her to keep in touch with Pathmark on a biweekly basis.

A plaintiff alleging retaliation arising out of post-employment conduct must show that the alleged retaliation prejudiced her ability to obtain or keep future employment. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1301 n.15 (3d Cir. 1997). Here, Ms. Sicalides admits that not only did she maintain her full-time job after she left Pathmark, but she also was able to replace her part-time work at Pathmark. Accordingly, this claim fails.

C. Quid Pro Quo.

Ms. Sicalides' claim for quid pro quo sexual harassment also lacks merit because Mr. Klein was not her supervisor. See Bouton v. BMW of North America, 29 F.3d 103, 106 (3d Cir. 1994)(quid pro quo cases involve supervisors using their authority over employees to extort sexual favors); Rufo v. Metropolitan Life Ins. Co., No.Civ.A. 96-6376, 1997 WL 332859 at *2 n.2 (E.D.Pa. Nov. 4, 1997) (employer may be strictly liable for sexual harassment by supervisor with actual or apparent authority to carry out threat or promise made to employee); Stafford v. State of Missouri, 835 F. Supp. 1136, 1149 (W.D.Mo. 1993)(holding that quid pro quo harassment occurs "when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply") (citing Jones v. Weco Investments, Inc. 846 F.2d 1154, 1156 (8th Cir. 1988); Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir. 1989); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988)). See also Coley v. Consolidated Rail Corp., 561 F. Supp. 645, 650 (E.D.Mich. 1982)(quid pro quo harassment entails a supervisor relying upon his actual or apparent authority to extort sexual consideration from an employee). Moreover, Ms. Sicalides' one-paragraph argument in support of this claim apparently concedes that quid pro quo harassment is

not actionable unless done by a supervisor. (See Pl.'s Br. at 11-12). Finally, Ms. Sicalides' Complaint does not allege that Mr. Klein conditioned any kind of benefit upon the receipt of her sexual favors.[10]

D. Constructive Discharge.

In order to establish a claim for constructive discharge, a plaintiff must show that the employer's alleged discriminatory conduct created an atmosphere that was the constructive equivalent to discharge. Gray v. York Newspapers, Inc., 957 F.2d 1070, 1079 (3d Cir. 1992). The court must determine whether the conduct complained of "would have the foreseeable result that the working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign." Id. (citations omitted).

In the instant case, Ms. Sicalides complaints that Mr. Klein "propositioned" and nudged her, and then seven months later, with no contact in between, yelled at her as she yelled back, and criticized her attitude and her uniform. We cannot conclude that these incidents are the type that are so unpleasant

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[10] We note that Pathmark's lack of notice of the alleged quid pro quo harassment is not a defense to this claim. See Rufo v. Metropolitan Life Ins. Co., No.Civ.A. 96-6376, 1997 WL 332859 at *2 n.2 (E.D.Pa. Nov. 4, 1997) (holding an employer is strictly liable for quid pro quo sexual harassment by a supervisor with actual or apparent authority to carry out the threat or promise made to the victim)(citing Robinson v. City of Pittsburgh, 120 F.3d 1289, 1300 (3d Cir. 1997)).

as would force a reasonable person to resign.[11]

Stewart v. Weis Markets, Inc., 890 F. Supp. 382 (M.D.Pa. 1995) is particularly instructive as to this claim. In Stewart, the plaintiff established that her supervisor subjected her to repeated sexually related epithets and insults. Id. at 390. After she complained about this behavior, her supervisor's sexual harassment ceased, but he began to be abusive to her in a more general manner, unjustifiably attacking the way she performed her job. Id. at 394. The plaintiff brought a claim for constructive discharge based upon this alleged non-sexual harassment. Id. at 391.

The court held that the non-sexual conduct the plaintiff described did not rise to the level of intolerable conduct necessary to sustain a claim for constructive discharge, noting the Third Circuit's warning in Clowes v. Allegheny Valley Hospital that constructive discharge claims based on close supervision of job performance must be "critically examined." Id. at 394 (citing Clowes, 991 F.2d 1159 (3d Cir. 1993)(holding that claim for constructive discharge where plaintiff was "singled out for especially close and harsh supervision" by her

[11] Notice, although a factor to be considered in a claim of constructive discharge, is not the sine qua non where individual supervisors had notice which may be imputed to the employer under agency law. Stewart v. Weis Markets, Inc., 890 F. Supp. 382, 391-92 (M.D.Pa. 1995)(citing Levendos v. Stern Entertainment, Inc., 909 F.2d 747, 751 (3d Cir. 1990)).

supervisor failed, since "unfair and unwarranted treatment is by no means the same as constructive discharge")). The Stewart court also noted that the plaintiff did not give her employer an opportunity to redress her concerns about the non-sexual harassment. As such, the court found that the plaintiff had fallen far short of establishing that the employer knowingly permitted to exist conditions of employment discrimination so intolerable that a reasonable person would be forced to resign.

Similarly, here, the March 11, 1998 alleged verbal harassment by Mr. Klein cannot sustain Ms. Sicalides' constructive discharge claim. Unlike the plaintiff in Stewart, Ms. Sicalides complains of only one incident. Moreover, the incident involves merely close scrutiny of her work and, at most, harsh supervision. Finally, as in Stewart, Ms. Sicalides did not permit Pathmark the opportunity to redress her concerns; rather, she refused to inform them about her claims and thereby obstructed the attempted investigation by the Human Resources department. Accordingly, her constructive discharge claim fails.

E. PHRA Claims.

Under the PHRA, a charge of discrimination must be filed within 180 days of the act of discrimination complained of. 43 P.S. § 959(h). Ms. Sicalides filed her EEOC charge on April 8, 1998. Therefore, the only timely incident under the PHRA is the March 11, 1998 "verbal harassment" in which Ms. Sicalides and

Mr. Klein raised their voices to each other, and during which Mr. Klein allegedly told Ms. Sicalides that she had a bad attitude and was not properly attired in her uniform.

Moreover, because Ms. Sicalides' Title VII claims fail, her PHRA claims lack merit for the same reasons. See Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996) ("Generally, the PHRA is applied in accordance with Title VII"); (Davis v. Sheraton Society Hill Hotel, 907 F. Supp. 896, 899 n.1 (E.D.Pa. 1995)("The PHRA is applied to accord with Title VII. For this reason, our discussion under Title VII applies equally to the PHRA claim.")

F. Intentional Infliction of Emotional Distress.

Under Pennsylvania law, the statute of limitations for the tort of intentional infliction of emotional distress is two years. Bartanus v. Lis, 480 A.2d 1178, 1186 (Pa.Super. 1984). Accordingly, Ms. Sicalides may not base this claim upon incidents which occurred before July 8, 1997, two years before she filed her Complaint. Therefore, the only incidents which could give rise to this claim are Mr. Klein's August, 1997 comment about his apartment and the March 11, 1998 "verbal harassment."[12]

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[12] Ms. Sicalides argues that these incidents are not time-barred by the statute of limitations. However, Ms. Sicalides' support for this argument consists in its entirety of the following

> [a]pparently, Defendants are of the perspective that Plaintiff should have hogged scarce judicial resources by initiating a separate and distinct lawsuit in state

However, Ms. Sicalides has failed to establish a claim for intentional infliction of emotional distress. Under Pennsylvania law, to state a claim for the tort of intentional infliction of emotional distress, a plaintiff must allege conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Decesare v. National R.R. Passenger Corp., No.CNA 98-3851, 1999 WL 33025, at *6 (E.D.Pa. May 24, 1999) (quoting Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988)). Additionally, a plaintiff must allege "physical injury, harm, or illness caused by the alleged outrageous conduct." Corbett v. Morgenstern, 934 F. Supp. 680, 684 (E.D. Pa. 1996). As the Supreme Court of Pennsylvania has stated, "[c]ases which have found a sufficient basis for a cause of action of intentional infliction of

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> court while she was exhausting her administrative remedies with the EEOC. Had Plaintiff done so, one would have required a stopwatch to calculate the time during which Defendants would have sprinted to the courthouse to dismiss the instant lawsuit for impermissible claim splitting. It is a specious argument.

Ms. Sicalides had cited to no authority standing for the proposition that the filing of an administrative charge with the EEOC tolls the statute of limitations for a state law claim of intentional infliction of emotional distress. Moreover, while Ms. Sicalides' appears to be advocating the efficient disposition of her claims, we cannot ignore the fact that Ms. Sicalides delayed initiating the administrative process for even her sexual harassment claims for so long that she must now rely upon a continuing violation theory to save the majority of them.

emotional distress have presented only the most egregious conduct." Hoy v. Angelone, 720 A.2d 745, 754 (Pa. 1998); Papieves v. Lawrence, 437 Pa. 373, 263 A.2d 118 (1970)(defendant, after striking and killing plaintiff's son with automobile, and after failing to notify authorities or seek medical assistance, buried body in a field where discovered two months later and returned to parents).

Further, intentional infliction of emotional distress cases in the employment context are rare, and the alleged conduct is not usually found to be extreme enough to rise to the level of outrageousness necessary to provide a basis for recovery for the tort. Hoy, 720 A.2d at 754; Cox v. Keystone Carbon, 861 F.2d 390, 395 (3d. Cir. 1988). Also, the Third Circuit has stated that "sexual harassment alone does not rise to the level of outrageousness necessary to make out a cause of action for the intentional infliction of emotional distress." Andrews v. City of Philadelphia, et al., 895 F.2d 1469, 1487 (3d Cir. 1990). However, when the harassment is coupled with retaliation for turning down sexual propositions, the Third Circuit acknowledges a higher likelihood of recovery. Id.

In the instant case, as in a dismaying majority of her brief, Ms. Sicalides' argument in support of this claim gives little, if any, indication of which alleged incidents form the basis of this claim, or upon what specific theory. (See Pl.'s

Br. at 15). However, the timely acts Ms. Sicalides complains of, specifically being nudged while Mr. Klein stated that his empty apartment would come in handy while his girlfriend was away, and seven months later being yelled at by Mr. Klein for her "bad attitude" and improper attire (supposedly in retaliation for rejecting the alleged August 1997 "proposition") fall far short of the sort of behavior which is so atrocious as to be intolerable in a civilized society. See Hoy, 720 A.2d at 754-55 (rejecting intentional infliction of emotional distress claim because sexual propositions, physical contact with the plaintiff's knee, off-color jokes, regular use of profanity, and the posting of a sexually suggestive picture were not sufficiently outrageous to support claim). Moreover, it follows that in light of the fact that the sexual harassment claims fail, the claim for intentional infliction of emotional distress cannot sustain. See Decesare, 1998 WL 330258, at *6.

An appropriate Order follows.